BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDY L. BAHNER MANSFIELD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,005,932
PB&J RESTAURANT, INC.	)	
Respondent	)	
AND	)	
	)	
HIGHLANDS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 1, 2004 Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on August 31, 2004. E. L. Lee Kinch of Wichita, Kansas, served as Board Member Pro Tem in place of Board Member Julie A. N. Sample, who recused herself from this proceeding.

APPEARANCES

Dennis L. Horner of Kansas City, Kansas, appeared for claimant. Seth G. Valerius of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties agreed claimant was earning an average of $339 per week when she testified at the November 2003 regular hearing.

ISSUES

Claimant alleges she sustained bilateral upper extremity injuries working for respondent as a pastry and dessert chef.

In the March 1, 2004 Award, Judge Hursh determined July 25, 2001, was the appropriate date of accident for claimant's repetitive use injuries as that was the last day she worked for respondent as a dessert chef. The Judge also determined claimant

sustained a 27 percent wage loss and a 40.5 percent task loss, which created a 33.75 percent permanent partial general disability.

Claimant contends Judge Hursh erred. Claimant argues her wage loss is greater than 27 percent. Claimant also argues the testimony of respondent's vocational expert Monty Longacre should not be considered as Mr. Longacre did not evaluate claimant's former work tasks until claimant's experts had testified. Consequently, claimant requests the Board to strike Mr. Longacre's testimony from the record and to increase her permanent partial general disability rating.

Likewise, respondent also argues Judge Hursh erred. Respondent contends claimant did not make a good faith effort to find appropriate employment after recovering from her bilateral upper extremity injuries. Accordingly, respondent argues the Judge should have imputed a post-injury wage that would disqualify claimant from receiving a permanent partial general disability greater than the 12 percent whole body functional impairment rating provided by Dr. Steven L. Hendler. Respondent also argues the Board should disregard both Dr. Truett L. Swaim's opinion regarding claimant's permanent functional impairment and the list of former work tasks prepared by vocational expert Michael J. Dreiling.

The issues before the Board on this appeal are:

1. Should the Board strike the testimony of Mr. Longacre because he prepared a list of claimant's former work tasks after claimant's expert witnesses testified?

2. What is the nature and extent of claimant's injuries and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent, who operates several restaurants, employed claimant as a dessert chef. In late 2000, claimant began experiencing symptoms in her hands and wrists. As she continued working, her symptoms progressively worsened with pain going from her wrists into her elbows, shoulders and up into her neck.

In early 2001, claimant sought treatment from her personal physician. And in June 2001, claimant reported her symptoms to her employer's workers compensation insurance carrier. On approximately July 25, 2001, respondent removed claimant from being a dessert chef to other kitchen duties, which she performed for approximately two weeks before being assigned to work as a part-time hostess.

The record is not entirely clear, but it appears claimant last worked for respondent in October 2001, when she was diagnosed with Graves' disease and took off work for approximately three weeks.

The Judge determined July 25, 2001, was the appropriate date of accident for claimant's repetitive use injuries and the parties do not challenge that date. The Board affirms that finding.

Claimant saw several doctors for her bilateral upper extremity symptoms. Eventually, claimant saw Dr. Steven L. Hendler, who first saw her in late December 2001 and who referred her to the KU Medical Center where she saw Dr. Michael Gorton. Dr. Gorton diagnosed bilateral thoracic outlet syndrome and in early April 2002 performed a left transaxillary first rib resection. In May 2002, Dr. Gorton performed the thoracic outlet decompression surgery on the right.

In June 2002, Dr. Gorton released claimant from his care and claimant resumed seeing Dr. Hendler, who recommended therapy. On July 12, 2002, Dr. Hendler released claimant to work with restrictions of no lifting more than 10 pounds, no overhead activities, and no repetitive upper extremity activities. And on August 26, 2002, Dr. Hendler determined claimant had reached maximum medical recovery and released her from his treatment.

Claimant contacted respondent about returning to work. But respondent was either unable or unwilling to return claimant to work.

Claimant, who has attained a bachelor's degree in criminal justice followed by an associate's degree in culinary arts and restaurant management, had some difficulty in finding another job. As part of her job search efforts to return to work, claimant contacted the State of Kansas regarding vocational training. Consequently, from December 2002 until March 2003, claimant attended courses learning computer programs and medical terminology. During that training, claimant worked part-time for a church from late October 2002 through mid-January 2003 as a facilitator for an autistic child. And in early April 2003, claimant began working for a temporary employment agency.

In July 2003, claimant began working for an appliance distributor. At the time of the regular hearing, claimant was working approximately 20 hours per month earning $15 per hour in that job. In September or October 2003, claimant began working an additional part-time job with a liquor retailer. At the time of the regular hearing, claimant was working for the liquor retailer approximately 30 hours per week earning $9 per hour. Based upon that

testimony, claimant's post-injury wage at the time of the regular hearing averaged $339 per week.[1] As indicated above, the parties agreed to that post-injury average weekly wage.

Respondent's vocational expert, Monty Longacre, evaluated claimant's former work tasks. Without interviewing claimant, Mr. Longacre prepared a list of work tasks that claimant performed in the 15 years before she developed the symptoms in her upper extremities. Rather than speaking with claimant, Mr. Longacre developed a list of claimant's former work tasks by reviewing the task list prepared by claimant's vocational expert Michael J. Dreiling, reviewing the occupational information claimant provided Dr. Swaim (which included an additional job as a stocker at a lumber company), obtaining information in a telephone conversation with one of respondent's representatives, and reviewing "a task list from Pastry Chef."[2] Mr. Longacre developed a list of 27 different former work tasks.

Mr. Longacre concluded claimant retained the ability to earn a wage that was comparable to her pre-injury wages. According to Mr. Longacre, claimant is presently capable of earning $18.09 per hour as a food service manager or $30.78 per hour as a criminal justice administrator, which equates to an average weekly wage of $724 to $1,231. Moreover, if claimant could perform the physical duties required of a secretary, Mr. Longacre believes she could earn up to $24,000 per year, or $28,080 per year including benefits, which equates to $462 to $540 per week.

On the other hand, claimant's vocational expert, Michael J. Dreiling, actually met with claimant and developed a list of only 12 former work tasks that she performed in the 15-year period before developing her bilateral thoracic outlet syndrome. Mr. Dreiling concluded claimant could earn approximately $25,000 per year ($481 per week) as a manager in the food service industry or approximately $24,000 per year ($462 per week) as either a medical secretary or security worker.

1. Should the Board strike the testimony of Mr. Longacre because his list of claimant's former work tasks was prepared after claimant's expert witnesses testified?

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[1] 20 hours per month is the equivalent of 4.6 hours per week (20 hours per month x 12 months ÷ 52 weeks = 4.6 hours per week). Accordingly, claimant earns an average of $69 per week (4.6 hours x $15 per hour = $69 per week) from the appliance distributor. Claimant earns $270 per week from the liquor retailer (30 hours per week x $9 per hour = $270 per week). And adding $69 to $270 equals $339 per week.

[2] Longacre Depo. (Jan. 16, 2004) at 10.

Claimant objected to Mr. Longacre's task list and testimony on the basis that Mr. Longacre evaluated and prepared a list of claimant's former work tasks after claimant's witnesses had testified. The claimant did not object regarding foundation.

But neither the Workers Compensation Act nor the Kansas Administrative Regulations address this topic. Accordingly, claimant's objection to Mr. Longacre's task list and testimony is without merit. The Judge was not asked to and did not impose any deadline for respondent to identify its experts or produce their testimony other than the terminal dates set for submitting all of respondent's evidence. Respondent complied with that deadline. As Mr. Longacre's depositions were taken within respondent's terminal date, the procedural requirements of the Judge were met.

The Board feels it would be useful if there were either a statute or regulations addressing the time lines for vocational evaluations, producing vocational reports and identifying expert and other witnesses. Consequently, claimant's counsel is encouraged to address such issues with the Director of Workers Compensation or the Workers Compensation Advisory Council.[3]

2. What is the nature and extent of claimant's injuries and disability?

Dr. Hendler, who practices physical medicine and rehabilitation, last saw claimant in late August 2002. The doctor diagnosed claimant with repetitive use syndrome in both upper extremities and bilateral thoracic outlet syndrome post bilateral transaxillary first rib resections. According to the doctor, claimant should not lift more than 30 pounds on an occasional basis and should not carry more than 20 to 25 pounds on an occasional basis. Dr. Hendler rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) and determined claimant has sustained a 10 percent functional impairment to each upper extremity, which converts to a 12 percent whole body functional impairment.

Dr. Hendler reviewed Mr. Dreiling's list of claimant's 12 former work tasks and concluded claimant was unable to perform six of the 12 tasks, or 50 percent. The doctor reviewed Mr. Longacre's list of 27 former work tasks and determined claimant was unable to perform five of the 27, or 19 percent.

Claimant's medical expert, board-certified orthopedic surgeon Truett L. Swaim, M.D., concluded claimant's job duties with respondent caused her to develop overuse syndrome in both arms, bilateral thoracic outlet syndrome, and chronic myofascial strain of the cervical region, which comprised a 23 percent whole body functional impairment

[3] See K.S.A. 44-596.

under the AMA *Guides* (4th ed.). The doctor rated claimant's bilateral upper extremities as comprising a 19 percent whole body functional impairment and rated her cervical strain as comprising a five percent whole body functional impairment.

Dr. Swaim believes claimant should limit her work to light duty, which would permit her to lift up to 20 pounds occasionally and up to five pounds frequently. But the doctor would restrict claimant from prolonged or repetitive use of her arms above shoulder level, limit lifting above shoulder level to 15 pounds maximum, and prohibit the repetitive or forceful use of either upper extremity. After reviewing Mr. Dreiling's task list, which was the only list available at that time, Dr. Swaim concluded claimant had lost the ability to perform six of the 12 former work tasks, or 50 percent.

Because claimant's injuries are not covered by the schedules in K.S.A. 44-510d, she is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the retained ability to earn wages rather than the actual post-injury wage being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[6]

And the Kansas Court of Appeals in *Watson*[7] held that a worker's failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find appropriate work, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the worker's residual capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[8]

Claimant presented a detailed list of the many contacts that she made to find work after she recovered from her work-related injuries and bilateral thoracic outlet decompression surgeries. That exhibit, coupled with claimant's testimony, established a prima facie case that claimant made a good faith effort to find appropriate employment. Accordingly, the burden of going forward with the evidence shifted to respondent.

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id.* at 320.

[7] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[8] *Id.* at Syl. ¶ 4.

> When an employer contests a worker's continuing good faith efforts to find appropriate employment, the employer has the burden of proof as that term is defined by K.S.A. 44-508(g).[9]

The Board concludes claimant's actual post-injury wages should be used in determining her permanent partial general disability. Comparing the $339 per week claimant was earning at the time of the regular hearing with the pre-injury average weekly wage of $816.96, claimant's wage loss for purposes of the permanent partial general disability formula is 58.5 percent as of November 2003.[10]

The Board also finds claimant has sustained a 42.25 percent loss of ability to perform the work tasks that claimant performed in the 15-year period before her injuries. That task loss percentage results from averaging Dr. Hendler's task loss percentages with Dr. Swaim's task loss percentage. Dr. Hendler concluded claimant had lost the ability to perform 50 percent of the former work tasks identified by Mr. Dreiling and had lost 19 percent of the former work tasks identified by Mr. Longacre, which average 34.5 percent. On the other hand, Dr. Swaim concluded claimant had lost 50 percent of the former tasks identified by Mr. Dreiling. Averaging 34.5 percent with 50 percent yields 42.25 percent.

As required by the permanent partial general disability formula, the worker's task loss is averaged with the worker's wage loss. Averaging a 42.25 percent task loss with a 58.5 percent wage loss yields an approximate 50 percent permanent partial general disability.

Based upon the above, the Award should be modified to increase claimant's permanent partial general disability from 33.75 percent to 50 percent. Should claimant's post-injury average weekly wage change, the parties may request review and modification as provided by the Workers Compensation Act.

AWARD

WHEREFORE, the Board modifies the March 1, 2004 Award and increases claimant's permanent partial general disability from 33.75 percent to 50 percent.

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[9] *Palmer v. Lindberg Heat Treating*, 31 Kan. App. 2d 1, Syl. ¶ 4, 59 P.3d 352 (2002).

[10] Claimant was earning less than $339 per week before obtaining employment in September or October 2003 with the liquor retailer. Therefore, claimant's wage loss for the period before the regular hearing would be greater than 58.5 percent. However, because of the accelerated payout method of permanent disability benefits, the Board need not compute the specific wage loss for those weeks preceding the regular hearing as a higher wage loss would neither increase the number of weeks of permanent disability benefits that claimant would be entitled to receive for that period nor increase the weekly compensation rate.

Wendy L. Bahner Mansfield is granted compensation from PB&J Restaurant, Inc., and its insurance carrier for a July 25, 2001 accident and resulting disability. Ms. Bahner Mansfield is entitled to receive 59.71 weeks of temporary total disability benefits at $417 per week, or $24,899.07, plus 180.10 weeks of permanent partial general disability benefits at $417 per week, or $75,100.93, for a 50 percent permanent partial general disability and a total award not to exceed $100,000.

As of September 15, 2004, Ms. Bahner Mansfield is entitled to receive 59.71 weeks of temporary total disability compensation at $417 per week in the sum of $24,899.07, plus 104.29 weeks of permanent partial general disability compensation at $417 per week in the sum of $43,488.93, for a total due and owing of $68,388, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $31,612 shall be paid at $417 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Seth G. Valerius, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director